

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

APR 23 2008

4 RICHARD DEEDS)

5 Plaintiff,)

6 vs.)

7 ROBERT BARATS, *et al.*,)

8 Defendants.)

3:03-CV-0453-LRH (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

April 23, 2008

10 This Report and Recommendation is made to the Honorable Larry R. Hicks, United States
11 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
12 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary
13 judgment re: disciplinary claims (#355 and #361 (*in camera*)). Plaintiff opposed as to defendant
14 Lamb (#373), and additionally filed a motion to dismiss defendant Lamb (#374). Defendants did
15 not oppose plaintiff's motion to dismiss. The court has thoroughly reviewed the record and the
16 motions and recommends that defendants' motion for summary judgment re: disciplinary claims
17 as to defendant Lamb (#355) be denied as moot, and plaintiff's motion to dismiss defendant Lamb
18 (#374) be granted.¹

19 **I. HISTORY & PROCEDURAL BACKGROUND**

20 Plaintiff Richard T. Deeds ("plaintiff"), a *pro se* prisoner, is currently incarcerated in the
21 custody of the Nevada Department of Corrections ("NDOC") at the Northern Nevada
22 Correctional Center ("NNCC") (#250). Plaintiff brings his second amended complaint pursuant
23 to 42 U.S.C. § 1983, alleging violations of his First, Fifth, Eighth, and Fourteenth Amendment
24 rights, and his rights pursuant to the Americans with Disabilities Act ("ADA"). *Id.* Plaintiff
25

26
27 ¹ Defendants' motion for summary judgment re: disciplinary claims involves plaintiff's claims
28 against defendants Kennedy, Thorpe and Lamb (#355). Plaintiff filed two oppositions – one as to defendants
Kennedy and Thorpe (#378), and one as defendant Lamb (#373). The court addresses the defendants' motion
for summary judgment as to defendants Kennedy and Thorpe in a separate report and recommendation.

names as defendants Robert Bayer, former NDOC Director; Jackie Crawford, former NDOC Director; Theodore D'Amico, NDOC Medical Director; Andrew Fras, NNCC Physician; Donald Helling, NNCC Warden; Chaplain Kelly, NNCC Chaplain; Keith Kennedy, NNCC Lieutenant; Janet Lamb, NNCC Correctional Nurse; Donald Thorpe, NNCC Correctional Officer; and Robert Barats, NNCC Correctional Officer.² *Id.*

The parties' motions pertain only to count four (#250).³ In count four, plaintiff alleges that from October 1999 through April 2000, defendant Lamb refused plaintiff access to the law library, prison law clerks, and legal supplies, in violation of his Fourteenth Amendment right to access to the courts. *Id.*

The Court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

II. DISCUSSION & ANALYSIS

A. Discussion

1. Motion to Dismiss Standard

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are construed in the light most favorable to the non-moving party. *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). For the movant to succeed, it must appear to a certainty that plaintiff will not be entitled to relief under the facts alleged in the complaint. *Rothman v. Vedder Park Mgt.*, 912 F.2d 315, 316 (9th Cir. 1990).

Under § 1983, plaintiff must allege that (1) defendants subjected him to the deprivation

² The court dismissed defendant Bayer on April 26, 2007 (#198, #240, #258 and #259).

³ In his second amended complaint, plaintiff did not set out formal "counts" (#250). Plaintiff sets out eleven claims in paragraph form. However, instead of numbering the paragraphs sequentially, plaintiff numbers his claims to correspond with numbers he assigned these claims in prior complaints. To avoid confusion, the court will refer to plaintiff's claims in sequence, as counts one through eleven, beginning with plaintiff's first paragraph.

1 of a right, privilege or immunity guaranteed by the U.S. Constitution or U.S. law, and (2) that the
 2 defendant acted under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *see also*
 3 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). ““Conclusionary allegations,
 4 unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights
 5 Act.”” *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984), *quoting*
 6 *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977).

7 **B. Analysis**

8 Plaintiff states in his motion to dismiss that his claim against defendant Lamb is based on
 9 a 1999-2000 directive that plaintiff be prohibited from accessing the law library, law clerks, or
 10 legal supplies (#374). Plaintiff further states that his claim against defendant Lamb is related to
 11 the fact that he was put on grievance restriction during this same time period and was unable to
 12 file grievances for a number of other claims in his complaint, particularly those claims against
 13 defendant D’Amico. *Id.* Plaintiff admits that he brought the claim against defendant Lamb
 14 merely to protect himself in the event that defendant D’Amico argued that plaintiff had failed to
 15 exhaust his administrative remedies. *Id.* Since defendant D’Amico did not assert the exhaustion
 16 defense, plaintiff now requests that the court dismiss the claims against defendant Lamb. *Id.*

17 Plaintiff’s motion to dismiss defendant Lamb is unopposed by defendants. Local Rule 7-2
 18 states “The failure of an opposing party to file points and authorities in response to any motion
 19 shall constitute a consent to the granting of the motion.” L.R. 7-2(d). As defendants did not
 20 oppose plaintiff’s motion to dismiss, the court concludes that they consent to the granting of the
 21 motion. The court further concludes that plaintiff’s motion has merit. As the court grants
 22 plaintiff’s motion to dismiss defendant Lamb, it need not discuss the merits of defendants’ motion
 23 for summary judgment re: disciplinary claims as to defendant Lamb.

24 **III. CONCLUSION**

25 Based on the foregoing and for good cause appearing, the court concludes that defendants
 26 consent to the granting of plaintiff’s motion to dismiss defendant Lamb. As such, the court
 27 recommends that defendants’ motion for summary judgment re: disciplinary claims as to
 28 defendant Lamb (#355) be **DENIED AS MOOT**, and plaintiff’s motion to dismiss defendant

Lamb (#374) be **GRANTED**.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within ten days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This report and recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment re: disciplinary claims as to defendant Lamb (#355) be **DENIED AS MOOT**, and plaintiff's motion to dismiss defendant Lamb (#374) be **GRANTED**.

DATED: April 23, 2008.



UNITED STATES MAGISTRATE JUDGE